TULANE
LAW REVIEW

VOLUME 48 APRIL 1974 NUMBER 3

PROFESSIONAL RESPONSIBILITY AND CONSTITUTIONAL DOCTRINE*

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On May 17, 1974, the United States will observe the twentieth anniversary of the announcement of the decision in *Brown v. Board of Education*.[1] The occasion will be marked, I am sure, by appropriate ceremonies and by a torrent of writings in many disciplines—by historians, educators, sociologists, philosophers, economists, psychologists, and legal academicians. The Civil Rights Commission, for example, is now at work on an elaborate and ambitious attempt to use the technique of oral history to scan the twenty-year impact of *Brown* on our society. All this attention is, of course, altogether fitting, for it is hard to think of a single domestic event in the United States or, for that matter, in any nation, that has led to more profound political and social changes.

It will be noted that I stress political and social changes rather than change in educational theory or legal doctrine. For, although the implementation of *Brown* has necessarily been achieved through the process of law, the decision itself, unlike other great constitutional pronouncements, does not appear to me to involve any profound doctrinal innovation. It is true that in dealing with the apparently continued existence of *Plessy v. Ferguson*,[2] the Court's opinion relied on the fact that it was racial segregation in schools that was before it, rather than some separate facilities in which physical equality could be more easily measured. This makes the case susceptible to evaluation as an application of educational theory

* The text of this article was delivered at the Tulane University School of Law as the Eighth Annual George Abel Dreyfous Lecture on Civil Liberties, November, 1973.

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1 Brown v. Board of Educ., 347 U.S. 483 (1954).

2 Plessy v. Ferguson, 163 U.S. 537 (1896).

that is little understood by anyone, remains unproved, indeed untested, and in any event is difficult to justify as a legitimate source of judicial decision-making, as Alexander Bickel has pointed out.[3] But the heart of *Brown* is something even less than what Bickel calls its "minimal proposition . . . that the state may not, by legislation or administratively, classify the population along racial lines."[4] All that *Brown* really decided was that neither the federal government nor the states could any longer constitutionally perpetuate the legal caste system that had grown up since the final failure of Reconstruction, around 1876, as a method of subjugation of blacks.

The immediate result of this stunning constitutional conclusion was the invalidation, on a massive scale, of innumerable state laws and practices. A whole structure of law, both embodying and reflecting a society of caste, was dismantled in consequence. The rapidity with which this was done is evidence that that was the heart of *Brown*. Scores of decisions by the Supreme Court and lower federal courts, particularly the Fifth Circuit, often sitting here in New Orleans, implemented this basic holding by striking down state-imposed segregation of any sort, from the drinking fountain on a public golf course to the spectator seat in the court-

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[3] A. Bickel, The Supreme Court and the Idea of Progress 119-66 (1970) [hereinafter cited as Bickel]. The underlying educational theory identified by Professor Bickel as "another element" in *Brown* is stated at pages 119-21 of his book. Briefly it is that black children will not distinguish between de jure and de facto reasons for their segregated schooling, and that since the Court held that separation "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," Brown v. Board of Educ., 347 U.S. 483, 494 (1954), the public schools as instrumentalities of the state have a constitutional obligation to give black children a racially integrated education. The word "solely" and implicit state action concepts make unclear, at least to me, that the Court actually had this reasoning in mind. Yet the opinion is imprecise and certainly susceptible of that interpretation. The decision then would rest in part on a theory as to the educational effect of racial segregation in *schools* (which of course simply reflects in large part, absent a dual school system, a society segregated residentially, economically, and socially) that I think would have to be called unproved and really untested. *See, e.g.*, the Coleman Report, Office of Education, U.S. Department of Health, Education and Welfare (1966) and numerous studies of the impact of public school finance systems cited in the footnotes to Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 Yale L.J. 409 (1973). This interpretation of *Brown* is, of course, still an underlying issue in current school litigation. *Compare, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). It is to be noted that the language in *Brown* quoted in this note was supported in the opinion by a finding made by a Kansas court, the first sentence of which said, "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children," while the second sentence said, in part, "[t]he impact is greater when it has the sanction of the law," thus neatly foreshadowing both strands of *Brown* identified in the Bickel lectures.

[4] Bickel, *supra* note 3, at 118.

room. None of those actions, of course, depended in any way on those parts of *Brown* which appeared to make the case turn on the fact that it dealt with racial segregation in educational systems.[5]

The basic principle in *Brown*, therefore does not, as I have said, involve new or complex constitutional doctrine. It is a fair jurisprudential question to ask the source of legitimacy for the power of the Court to announce such a principle. Yet even that question seems to arise only because of the enormous political and social effects that the Court's action was bound to have, and not because of real doubts as to the Court's authority to decide the cases the way it did.[6]

The case for legitimacy can be stated very succinctly: There has never been any doubt of the power or duty of the Court to overturn state laws in cases where the rights of one of the parties turns on the validity of the laws under the federal constitution.[7] There was no contention that the cases decided in *Brown* were not such cases. This being so, it becomes virtually impossible, as Paul Freund has said, to imagine what other course the Court could have taken. The decision was no abrupt departure from the past, as the reapportionment decisions,[8] for example, might be argued to be. Rather it was foreshadowed by decades of judicial inroads on the system of white supremacy in the South.[9] *Plessy* itself, which purported only to pass on an abstract concept of equality and not to bestow legitimacy on a whole system of oppression, had proved

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[5] *See* cases cited in T. Emerson, D. Haber & N. Dorsen, Political and Civil Rights in the United States 1627 n.3 (3d ed. 1967). There exist hundreds of other decisions, many unreported, that implement *Brown* in cases unrelated to educational theory.

[6] The classic questioning of the source of legitimacy for *Brown* is in Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959) [hereinafter cited as Wechsler], also appearing in Principles, Politics and Fundamental Law 3-48 (1961). In my judgment, however, Professor Wechsler could not have written that portion of his lecture the way he did had he fully understood and personally experienced the pervasiveness of the segregation laws in the South and the enormity of their impact on the blacks who lived there, in every aspect of their lives.

[7] *See* H.M. Hart & H. Wechsler, The Federal Courts and the Federal System 9-10 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]. Lower federal courts exercised this power as early as 1791. I C. Warren, The Supreme Court in United States History 65-69 (rev. ed. 1926). *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) and innumerable subsequent decisions. *Compare* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[8] *See* Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

[9] *See, e.g.*, McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (higher education); Sweatt v. Painter, 339 U.S. 629 (1950) (higher education); Shelley v. Kraemer, 334 U.S. 1 (1948) (housing); Smith v. Allwright, 321 U.S. 649 (1944) (voting); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (higher education); Nixon v. Herndon, 273 U.S. 536 (1927) (voting); Buchanan v. Warley, 245 U.S. 60 (1917) (housing); Strauder v. West Virginia, 100 U.S. 303 (1880) (juries).

to be the virus for the most malignant and massive cancerous growth ever to affect the system of law in the United States. Although basically unquestioned until the 1930's, its doctrine had rarely been applied by the Supreme Court since its pronouncement —never, I believe, after 1927, and then in a case in which a person of Chinese ancestry objected to his assignment to a black school in Mississippi.[10] The history of the Fourteenth Amendment was at most, as the Court said, inconclusive, and reliance on history alone in 1954 would in any event have been contrary to most of the history of the Court's own role in expounding the Constitution. In these circumstances, it would truly have been unthinkable—to borrow a word from the Court's companion opinion in *Bolling v. Sharpe*,[11] where the process of rationalization, had it been tried, would have been more difficult than in *Brown* itself— for the Court either to have reaffirmed *Plessy*, on the one hand, or to have abandoned its constitutional function, and treated the question of the constitutional validity of a legal system of oppression as one to be left to Congress and the executive, like the status of organized baseball under the Sherman Act.[12]

Had the Court, in *Brown*, confined itself to what was being decided—the constitutionality of the Jim Crow system of law—it might have avoided for a while some of the problems of constitutional doctrine that did follow from the decision and are still emerging. But it is more likely that those problems are implicit in the outlawing of imposed racial segregation, particularly in school systems, as Bickel and Wechsler have noted,[13] regardless of the way in which the constitutional decision is framed. There have grown up at least four such problem areas, all interrelated, and all still unresolved. They are a part of the judicial history of the past twenty years.

In the first place, the Court could not escape the problem of remedy, as it recognized in *Brown* itself by setting that question down for argument the next term.[14] Its initial concern, which I shall come back to later, was more immediately with the enforce-

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[10] Gong Lum v. Rice, 275 U.S. 78 (1927).

[11] Bolling v. Sharpe, 347 U.S. 497, 500 (1954). The opinion is six paragraphs long, and turns, of course, not on the effect of a Reconstruction amendment, but of the Fifth, which historically must have been considered consistent with slavery itself.

[12] The bootstrap judicial exemption of organized baseball from the Sherman Act took place through the decisions in Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, 346 U.S. 356 (1953); Federal Baseball Club v. National League, 259 U.S. 200 (1922).

[13] Bickel, *supra* note 3; Wechsler, *supra* note 6.

[14] Bolling v. Sharpe, 347 U.S. 497, 500 (1954); Brown v. Board of Educ., 347 U.S. 483, 495-96 (1954). The opinion on remedies is in Brown v. Board of Educ., 349 U.S. 294 (1955).

ability of its decree, with compliance, rather than with the form of relief. Time after time in oral argument, and no doubt also in the confines of the conference room, the question was raised not of the constitutional authority, but of the practical institutional effectiveness of the Court to cause to happen the vast changes implicit in its decision.[15] Yet there were present, all along, the complicated technical problems of relief—of school closings, so-called "private" schools, freedom of choice plans, gerrymandered districts, zoning, pairing, busing, and the consolidation of districts—that are now the source of deep division in and outside of the Court.[16]

Secondly, and intertwined with the matter of relief, is the question of the application of *Brown* to the great cities of the North. I have described the case as essentially a decision against the constitutionality of Jim Crow, and that is what it was. But, for a complex of reasons so impenetrable as to be incapable of even classification in disciplinary terms, some of which are nevertheless plainly not unrelated to the legacy of slavery, as well as to the long existence of the legally segregated society of the South, the cities of the North became segregated on a racial basis. That fact is not easily separable from the many ways in which states organize their school systems, and in at least some cases involving pupil assignment and school zone decisions, the same racially motivated state action, or at least state action having the same effect as deliberate racial classification, is apparent that found undisguised expression in the separate school systems of the South. So it has happened that the federal courts have also become embroiled since 1954 in the management and structure of school systems from New Rochelle to Detroit, Pontiac, Michigan, and the Chicago suburbs.[17]

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[15] The complete argument is published in L. Friedman, Argument (1969). *See* Cooper v. Aaron, 358 U.S. 1 (1955) (signed by all nine Justices).

[16] *See, e.g.*, United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); McDaniel v. Barresi, 402 U.S. 39 (1971); Davis v. Board of School Comm'rs, 402 U.S. 33 (1971); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968); Green v. County School Bd., 391 U.S. 430 (1968); Griffin v. County School Bd., 377 U.S. 218 (1964); Goss v. Board of Educ., 373 U.S. 683 (1963); McNeese v. Board of Educ., 373 U.S. 668 (1963). Of course, the great burden of handling questions of remedy fell on the district courts and the courts of appeal, particularly in the Fourth and Fifth Circuits. *E.g.*, Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962).

[17] *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Davis v. School Dist., 307 F. Supp. 734 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); United States v. School Dist. No. 151, 301 F. Supp. 201 (N.D. Ill. 1969), *modified*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 404 U.S. 913 (1971); Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y. 1961). *See also* Hobson v. Hansen, 269 F. Supp. 410 (D.D.C. 1967), *aff'd*, 408 F.2d 175 (D.C. Cir. 1969) (attempting to deal with racial segregation

Third, and perhaps not so inevitably, there are the consequences of the fact that *Brown* and its successors generalize from the constitutional status of Jim Crow laws that historically and legally were a method of subjugation of blacks, to the question of racial classifications of any sort and for any purpose. There is no question that some racial classifications, for some purposes, turn on identical constitutional doctrine as that which was at stake in *Brown*. That is true, for example, of the internment of Japanese-Americans by the federal government during the war, of the Indian school system that existed in some North Carolina counties before *Brown*, side by side with a white school system and a black school system, and of some practices surrounding the classification of Chicano children in the Southwest. But it is not true of remedial action in admissions or employment policy that results in turning down an equally qualified white for a qualified black, in a system that previously admitted or employed no blacks at all.[18] Nor is it true, on the other hand, of purely statistical demands and surveys—essentially quota systems—that depend on race alone, aligned against population percentages, for judging whether racial discrimination exists, or how to eliminate it. Nor, finally, is the transference justified, which is too easily and too often made by courts as well as legislative and executive bodies, from the unique American dilemma of racial discrimination to differences of various sorts based on sex, or even on religion.

Fourth, the *Brown* decision accentuated, although it did not create, the doctrinal difficulty in deciding what constitutes state action. In part, the application of *Brown* to the states and cities that have not had a formal structure of segregation laws turns on this question. But the problem arose most seriously, after *Brown*, in the sit-in cases, where the question ultimately presented was the constitutionality of state enforcement of its trespass laws to implement racial discrimination in private property. Of all the doctrinal issues raised by *Brown*'s outlawing of the caste system of law, those cases involved the most intricate, the most difficult, and the most dangerous issues, because of the specter of self-help. The Court as a whole was unable either to articulate a rationale forbidding this kind of state action, on the one hand, or to uphold the convictions that came before it, on the other. To avoid either definitive decision, the Court invoked again and again rationales

in a school system that was almost ninety per cent black). These are again examples of litigation that is endemic to race problems in the United States. There exist in addition an enormous number of related administrative proceedings by the Department of Health, Education and Welfare under Title VI of the Civil Rights Act of 1964.

[18] *See, e.g.*, De Funis v. Odegaard, 507 P.2d 1169 (Wash. 1973), *cert. granted*, 42 U.S.L.W. 3306 (U.S. Nov. 20, 1973) (No. 73-235), *noted in* 48 Tul. L. Rev. 403 (1974).

that distinguished and did not decide, and in the end was rescued by the national decision embodied in the Civil Rights Act of 1964.[19]

These four areas of doctrinal development are now the focal point of the attention of legal historians. But they are not central to the history of *Brown* in the past twenty years. They developed late in those years, none much earlier than ten years after the decision, and are still developing. I want instead to look at the thrust of that history from the point of view of the responsibility of the legal profession. It is a history of massive legal and political resistance to the *Brown* decision in the states most affected by it, coupled later with dangerous and violent physical resistance, and then by massive compliance. In all of that, the bar played an enormously important role. The treatment of *Brown* by the bar therefore seems to me to raise as well as any matter the question in what sense the profession of law is a principled profession, as it claims to be, and not simply a lucrative and entertaining one. That question turns both on those functions of the profession that create its special responsibilities, and the relationship between those functions and the development of constitutional doctrine.

The words "professional responsibility" are not, of course, without content, although they have received, in my judgment, far too little serious, critical academic attention. They have replaced the words "legal ethics," and quite properly so, for those words connoted only a vague morality for a profession that carries very heavy fiduciary obligations and is responsible in large part for the administration of justice. In January, 1970, as every law student should know but probably does not, the new Code of Professional Responsibility became effective for members of the American Bar Association, following six years of committee work and final adoption by the House of Delegates in August, 1969.[20] It has now been

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[19] *See* Bell v. Maryland, 378 U.S. 226 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Avent v. North Carolina, 373 U.S. 375 (1963); Gober v. City of Birmingham, 373 U.S. 374 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963); Garner v. Louisiana, 368 U.S. 157 (1961); Boynton v. Virginia, 364 U.S. 454 (1960). The Court averted a deluge of some 3,000 additional cases on their way up by deciding in Hamm v. City of Rock Hill, 379 U.S. 306 (1964), that they were all abated by the passage of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000 a (1970).

[20] *See* ABA Code of Professional Responsibility and Canons of Judicial Ethics (1970) [hereinafter cited as Code]. References in following footnotes are to the ABA print, which also contains the notes to the Ethical Considerations [hereinafter cited as EC] and Disciplinary Rules [hereinafter cited as DR] appearing in the report of the Special Committee on Evaluation of Ethical Standards that recommended the new Code. Specific citations to the formal adoption of the Code in the various states and the District of Columbia can be obtained from the ABA Standing Committee on Ethics and Professional Responsibility, 1155 East Sixtieth Street, Chicago, Ill. 60637.

adopted, although with some variations, in 48 states and the District of Columbia—by the Supreme Court of Louisiana on June 12, 1970, effective as of July 1 of that year. So it comprises the current positive law on professional responsibility, and is a starting point.

It is apparent, however, from reading the Code as a single work that the view it takes of professional responsibilty is a narrow one, in many ways technical. Both the Ethical Considerations and Disciplinary Rules are concerned primarily with lawyer-client relations. If the Code envisages any responsibility of the profession to society or for the rule of law generally, it is a marketplace view of the function of lawyers that prevails—that the invisible hand of the adversary system will deliver justice in the end. Thus the Disciplinary Rules implementing Canon 7, which says that a lawyer should represent a client zealously within the bounds of the law, make a nice distinction between exhortation and permission, and between ends and means, by providing that a lawyer *shall* not fail to seek the lawful objectives of his clients, but *may* refuse to aid conduct he believes to be unlawful.[21] The only duty to the system of law that is made explicit is the lawyer's duty to the adversary system.[22]

Within this narrow framework, there are three commands in the Code which seem to be directly relevant. One is the recognition of the difference of function in advocacy and the giving of advice. The Ethical Considerations state that a lawyer acting as advocate should resolve "doubts as to the bounds of the law" in favor of his client, but not necessarily so when acting as adviser, when he should give "his professional opinion as to what the ultimate decisions of the courts would likely be."[23] Similarly Canon 5 tells us to "exercise independent professional judgment on behalf of a client," and its Ethical Considerations require that that judgment be solely for the benefit of the client and "free of compromising influences and loyalties."[24] While obviously written with conflicting financial interests in mind, this at least suggests a responsibility to give advice free of political interests as well, including personal opinions as to the wisdom of the Supreme Court. A related Ethical Consideration warns against the lawyer being swayed by "the desires of others [apart from his client] that might impair his free judgment."[25]

Secondly, while the Code is most diffident about the responsibilities lawyers may owe the legal system, even the courts, it does

[21] *Id.* at DR 7-101 A(1).
[22] *Id.* at EC 7-19 *et seq.*
[23] *Id.* at EC 7-3.
[24] *Id.* at EC 5-1.
[25] *Id.* at EC 5-21.

forbid in two places the presentation of a claim or defense not "warranted under existing law."[26] These Rules are qualified, quite properly, by permission to do so "if [the claim or defense] can be supported by good faith argument for an extension, modification, or reversal of existing law."[27] The Ethical Considerations also condemn the use of "fraudulent, false, or perjured testimony," while at the same time advising the lawyer "to present any admissible evidence his client desires to have presented," unless, apparently, he is sure it is false.[28] Finally, Canon 8 contains a general exhortation to assist in improving the legal system.[29]

Third, the Code retains the American bar's traditional view, which stands in contrast to the English practice,[30] that a lawyer has no duty to take on clients he does not want. Canon 2 does importune lawyers to "assist the legal profession in fulfilling its duty to make legal counsel available."[31] But the implementing Ethical Considerations state that a lawyer "is under no obligation to act as adviser or advocate for every person who may wish to become his client,"[32] and the Disciplinary Rules under the Canon contain no prohibitions at all, except with respect to withdrawal after a client has been accepted. The Code thus itself undercuts a general statement in the Ethical Considerations about "distinguished and sacrificial services by lawyers who have represented unpopular clients and causes," and the more positive advice that "[r]egardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse."[33]

Some questions concerning the professional conduct of lawyers after *Brown* can be identified in the limited reach of these provisions of the Code of Professional Responsibility. In identifying these questions, I am, of course, talking primarily of professional conduct in the states that had, prior to 1954, legal systems of racial segregation, plus the District of Columbia. But it should be clear that I am not making any historical or factual judgment about the conduct of the bars in those states generally, or of any particular lawyers.[34] My purpose is only to isolate for analysis the

[26] *Id.* at DR 2-109 A(2) and DR 7-102 A(2).
[27] *Id.* at DR 7-102 A(2).
[28] *Id.* at EC 7-26 and EC 7-28.
[29] *Id.*
[30] *See* Rostow, *The Lawyer and His Client*, 48 A.B.A.J. 25, 146 (1962).
[31] Code, *supra* note 20.
[32] *Id.* at EC 2-26.
[33] *Id.* at EC 2-27.
[34] It is, I hope, unnecessary to add that were I doing so, I could not fairly rely on the Code of Professional Responsibility, but would have to revert to the pre-existing Canons, which were too bland to be susceptible of any analysis at all.

questions that arise in the wake of a constitutional pronouncement of the magnitude of *Brown*, both because they might deserve historical, empirical study, and because of the need, which has become obvious this year as never before, for public and law school attention to these issues.

The commands of the Code with respect to false testimony and unwarranted defenses are addressed to individual lawyers in their representation of particular clients in discrete litigation. Yet the problem that *Brown* posed for individual members of the profession in those areas that were immediately affected by it was so massive that it is possible to generalize about it as one facing the bar as a whole.

The problem was that *Brown* made it necessary in litigation to attempt to portray state action that everyone knew was based on race as if it were color-blind. The defense in the *Meredith* case, which eventually led to a small war when Meredith finally entered law school at the University of Mississippi, was that the university's refusal to admit Meredith had nothing to do with the fact that he was black.[35] In that fashion, in that case and many others, the judicial process had to contend with a myth. The inescapable fact is that for a period, in order to prevent the racial structure of the society from collapsing overnight, the legal system was forced to imagine a world that did not exist, and state officials and their lawyers, including prosecutors, as well as the courts themselves in many instances, became a part of an effort to base legal conclusions on the presumption of the existence of the imagined world.

A related problem is the matter of relitigation of constitutional doctrine. It is not to be expected, and certainly not to be desired, that individual lawyers in litigation should accept as conclusive against their particular case any constitutional doctrine whose reach is still unexplored.[36] Hart's famous dialogue on the power of

[35] Meredith v. Fair, 202 F. Supp. 224 (S.D. Miss.), *rev'd*, 305 F.2d 341 (5th Cir.), *stay vacated*, 306 F.2d 374 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962). Some of the history of the Meredith litigation, which is an instance of massive resistance, is also to be found in the Supreme Court's opinion in a phase of the ensuing contempt action against Governor Barnett. United States v. Barnett, 376 U.S. 681 (1964). The district court's opinion in the case, holding that the University of Mississippi was not a segregated institution and that Meredith's rejection by it had nothing to do with his race, is obviously a piece of the extraordinary mythology. Since two of the incumbent judges of the Court of Appeals for the Fifth Circuit, as well as the then President of the American Bar Association, appeared as counsel for various defendants in the appellate stages of the proceedings, it should be noted that they were not counsel at the trial where the defense I have referred to was attempted to be made.

[36] "But conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for

Congress to limit the jurisdiction of federal courts says in one of its most eloquent paragraphs:

> The deepest assumptions of the legal order require that the decisions of the highest court in the land be accepted as settling the rights and wrongs of the particular matter immediately in controversy. But the judges who sit for the time being on the court have no authority to remake by fiat alone the fabric of principle by which future cases are to be decided. They are only the custodians of the law and not the owners of it. The law belongs to the people of the country, and to the hundreds of thousands of lawyers and judges who through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people's sense of justice.[37]

Yet it is one thing to say that constitutional doctrine must stand the test of principled reason, and quite another to say that a decision like *Brown* is only the law of the case, not binding in other cases, and that the issues of constitutionality, of the Supreme Court's power of judicial review, and of the effectiveness of the doctrine of interposition can be relitigated in every case. Thus in the terms of the Code, the widespread temporary refusal to accept *Brown* as the law of the land, as well as the law of the case, raises questions of the meaning of a professional responsibility not to assert a claim or defense unwarranted under existing law.

These questions, like those involving the stricture against the use of false testimony, are raised in the context of the litigation that flooded the courts after *Brown*. Behind that, and even more unknowable historically, is the degree of strain that *Brown* put on the individual lawyer's responsibility, under the Code, to use his best professional judgment in giving advice, free from outside interests and pressures. It may be that these commands are limited to conflicting financial interests, but the enormous political and social pressures engendered by *Brown* during the first decade after its announcement were at least as apt as financial matters to distort the professional judgment of members of a profession that was almost totally white and represented for the most part only institutions and people that were part of a white society whose supremacy was protected by law.

If these are matters that normally—in other contexts—touch only the professional responsibility of individual lawyers, and not

plenary federal judicial review." Fay v. Noia, 372 U.S. 391, 424 (1963). *See also* Henry v. Mississippi, 379 U.S. 443 (1965), which was relitigated several times. These cases, among many others, make it clear that it is dangerous to state too broadly any limitation that is claimed to be imposed on litigating zeal by reason of the obligations of some general professional responsibility. *See* N. Dorsen & L. Friedman, Disorder in the Court, preface and ch. 7 (1973).

[37] Hart & Wechsler, *supra* note 7, at 356.

of the bar as a whole, that is not so of the responsibility of the profession to make legal counsel available to all. The question is unavoidable whether either individual lawyers or the organized bars gave sufficient attention to their responsibilities under Canon 2, in the light of *Brown*. The decision created an immense need for legal representation of blacks seeking court implementation of their newly determined rights through affirmative civil litigation. The degree of commitment of the profession as a whole to this responsibility must be measured by the extent to which it moved to meet this need, and also by the extent to which it resisted organized legal assistance by the NAACP Legal Defense Fund and other groups.[38] Professional responsibility exercised in this regard by individual white lawyers during the years following *Brown* proved to be a luxury, financially as well as socially, that few could afford,[39] so that institutional action of some sort was plainly required.

The professional responsibilities discussed thus far are recognized by the organized bar and are designed to make the system work. They view law as a process and the function of lawyers as limited to playing their part in the process under constraints on what they can do for their clients without polluting the process itself. Does that exhaust the subject? In the past, as head of the Civil Rights Division, I urged that there was a broader and substantive responsibility on lawyers, because of their profession, to defend the decisions of the Supreme Court, to urge compliance with them, and, in that manner, to support the rule of law.[40] I pointed out that corporate lawyers in fact carry a large part of the burden of law enforcement, particularly in the tax,[41] securities and antitrust fields, and that their responsibilities in such areas are not solely to

[38] For a partial, very incomplete sample of some of the litigation that the NAACP proper and the NAACP Legal Defense Fund had to undertake to keep themselves in business, *see* NAACP v. Alabama, 377 U.S. 228 (1964); NAACP v. Button, 371 U.S. 415 (1963); Chelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960); Harrison v. NAACP, 360 U.S. 167 (1959); NAACP v. Alabama, 357 U.S. 449 (1958).

[39] *See, e.g.*, C. Morgan, A Time to Speak (1964). Mr. Morgan, a white Birmingham lawyer, was effectively driven out of practice in Birmingham because he spoke when he thought his time to speak had come.

[40] *Compare* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 Harv. L. Rev. 1, 2-3 (1957), in which the authors commence by worrying aloud about their own responsibility for affecting public acceptance of the legitimacy of decisions of the Court when the Court was under broad attack, of constitutional dimensions and constitutional implications, because of its judgment in the *Brown* case.

[41] *See generally* B. Bittker, Professional Responsibility in Federal Tax Practice (1970). It would be comforting, but totally inaccurate, to characterize Professor Bittker's compilation of materials on professional responsibility in a particular area of the practice as being one of a *genre*. As far as I know it is unique rather than typical. One hopes that similar works will be put together in the future in such fields as antitrust, poverty law, securities work, civil rights practice, etc.

their clients but to the law itself. The question is emerging now, for example, to whom a law firm is responsible when it signs off on a registration statement—to the issuer, to the issuer's management (a quite different matter), or to the investing public and the SEC as well. Is there not some parallel duty to the law following the pronouncement of constitutional doctrine, as in *Brown*, that will have a profound and shattering effect on the society in which the lawyers play such an important part in the legal process?

On reexamination of this question, I find myself at variance with the view I held when I was seeking support for the work of the Department of Justice, and for the movement towards racial equality, wherever I could. My argument then was that the failure of agencies of the state to comply voluntarily with *Brown* was as if lawyers advised their clients not to pay their income taxes until sued. But the analogy is obviously incomplete. Putting aside the question of what "deliberate speed" meant at that time, there is plainly a difference between the duty of a private citizen to pay his taxes, and of his lawyer to tell him to do so, and whatever the responsibilities are of a public body caught between the demands of state policy and custom and a Supreme Court decision in a case to which it was not a party. It puts too great a burden on lawyers as a group, and for that matter elevates too high the legal factor in what is plainly a vast political and social upheaval, to say that their responsibility for urging voluntary compliance is greater than that of political leaders, for example, or the clergy, or the press. And there are other problems.

For one thing, it is apparent that the responsibility of a lawyer to urge compliance with *Brown* varies with the view the lawyer holds of that decision. I have stated my reasons for believing in the legitimacy of the Court's action, but in doing so departed to some extent from the Court's own reasoning.[42] If the case is looked upon as based on an educational theory, its legitimacy is open to serious question, and, if it is not, it is vulnerable for failing to articulate the principled reasons on which it rests. Further, any duty to defend and urge deference to constitutional doctrine cannot depend on

[42] *See* discussion at pp. 467-68 *supra*. While I hold to my view that *Brown* did not really turn on the fact that it was in the schools, rather than some other state institutions, in which racial discrimination was being imposed by law, much of the argument in the Court's opinion is to the contrary. The Court did state, just prior to the magic words "we hold," that "[w]e conclude that *in the field of public education* the doctrine of 'separate but equal' has no place. Separate *educational* facilities are inherently unequal." Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (emphasis added). This forces me to acknowledge that I am construing the decision in a way that automatically treats it as a departure from the requirement of principled reasoning that Professors Bickel, Wechsler and others, quite properly impose on the work, and particularly the constitutional work, of the Court.

what the doctrine is. There is no way of establishing such a responsibility with respect to *Brown*, but not *Plessy*;[43] *Gomillion*,[44] but not *Dred Scott*;[45] *McCulloch v. Maryland*[46] and *Gibbons v. Ogden*,[47] but not *Hammer v. Dagenhart*[48] and *Schechter Poultry*;[49] or *Dombrowski*,[50] but not *Abrams*,[51] at least when the latter-mentioned case in each pair was still law. And it is at least complicated, although by no means impossible, to defend non-compliance with state law before it has been formally invalidated, but not non-compliance with federal law when an inconsistent state law still stands.[52]

Having said this, there is one further point to add. If it is true that no professional responsibility rests with either the bar generally, or with individual lawyers in their professional roles, to defend constitutional doctrine as such, or in this case to urge voluntary compliance with *Brown's* mandate, there nevertheless remains perhaps a residual but crucial responsibility in the profession, and in schools of law, to the rule of law in two respects. One is to see to it that the constitutional process is understood, however wrong the *Brown* decision itself may be viewed. The other is to ensure ultimate compliance with law enforcement in its more neutral sense—with court orders, in the case of *Brown*— in a way that avoids violence, intimidation, and harassment of those seeking their rights. As Henry Hart said in the passage just quoted, Herbert Wechsler said also at the end of a lecture in which he expressed considerable doubt that *Brown* met the test of principled rationality:

> I should certainly add that I offer no comfort to anyone who claims legitimacy in defiance of courts. This is the ultimate negation of all neutral principles, to take the benefits accorded by the constitutional system, including the national market and common defense, while denying it allegiance when a special burden is imposed. That certainly is the antithesis of law.[53]

Perhaps the bar and its individual members have never faced as difficult questions of professional responsibility as those that confronted them in the segregated states after *Brown*. They were

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[43] Plessy v. Ferguson, 163 U.S. 537 (1896).
[44] Gomillion v. Lightfoot, 364 U.S. 339 (1960).
[45] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
[46] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[47] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
[48] Hammer v. Dagenhart, 247 U.S. 251 (1918).
[49] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[50] Dombrowski v. Pfister, 380 U.S. 479 (1965).
[51] Abrams v. United States, 250 U.S. 616 (1919).
[52] *See* Marshall, *The Protest Movement and the Law*, 51 Va. L. Rev. 785, 793-800 (1965) and articles cited at note 11 therein.
[53] H. Wechsler, Principles, Politics and Fundamental Law 47 (1961).

questions that reflected the large demands that *Brown* made upon the society of which lawyers were a part. In the end, the legal system of that society adjusted on a massive basis, with massive compliance, as I have said. It may be that that happened as rapidly as possible, and that attention of the profession to the aspects of responsibility I have referred to would not have made any difference. But enough time has passed now that they can be reexamined without rancor and with some dispassion. I think it important that that be done not only for what wisdom may be gained, but also because it is crucial in this country at this time that law be looked on as a principled profession.